

1 HONORABLE BENJAMIN H. SETTLE  
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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT TACOMA

10 HP TUNERS, LLC, a Nevada limited liability )  
11 company, ) NO. 3:17-cv-05760-BHS  
12 Plaintiff, )  
13 vs. ) PLAINTIFF/COUNTER-DEFENDANT'S  
14 KEVIN SYKES-BONNETT and SYKED ) ANSWER TO COUNTERCLAIMS  
15 ECU TUNING INCORPORATED, a )  
Washington corporation, )  
Defendants. ) JURY TRIAL DEMANDED

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16 Plaintiff/Counter-Defendant, HP TUNERS, LLC ("HPT"), for its answer and affirmative  
17 defenses to Defendant/Counter-Plaintiff's Counterclaims, states as follows.

18 COUNTERCLAIMS

19 PARTIES

20 1. Kevin Sykes-Bonnett is a resident of Washington and is the President of Syked  
21 ECU Tuning Incorporated ("Syked Tuning"), which is a corporation existing under the laws of  
22 Washington with its principal place of business in Puyallup, Washington.

23 ANSWER: Upon information and belief, admit.

24 2. HPT is a Nevada limited liability company with its principal place of business in  
25 Buffalo Grove, Illinois.

1 ANSWER: Admit.

2 **JURISDICTION AND VENUE**

3 3. This is a civil action seeking damages and injunctive relief under the Copyright  
4 Act, 17 U.S.C. § 101 et seq., and under the laws of the State of Washington.

5 ANSWER: Admit Defendants/Counter-Plaintiffs have initiated a civil action seeking  
6 damages and injunctive relief under the Copyright Act, 17 U.S.C. § 101 et seq., and under the  
7 laws of the State of Washington but deny that Defendants/Counter-Plaintiffs are entitled to any  
8 relief whatsoever.

9 4. This Court has subject matter jurisdiction over Syked Tuning's violation of  
10 Section 1201 of the DMCA pursuant to 28 U.S.C. §§ 1331 and 1338(a). Pursuant to 28 U.S.C. §  
11 1367, this Court has supplemental jurisdiction over Syked Tuning's state law claims for breach  
12 of contract and intentional interference with contract in that they are so related to Syked  
13 Tuning's claims under the Copyright Act as to be part of the same case or controversy.

14 ANSWER: Admit.

15 5. This Court has personal jurisdiction over HP Tuners by virtue of the pending  
16 action filed in this judicial district by HP Tuners, and because many of the acts complained of  
17 occurred in this District, and further because HP Tuners does substantial business in this District  
18 and the instant counterclaims pertain to that business.

19 ANSWER: HPT does not contest personal jurisdiction in this District for purposes of  
20 this matter.

21 6. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391 and 1400 because  
22 this is a judicial District in which a substantial part of the events giving rise to the claims  
23 occurred, and/or in which Syked Tuning's injury was suffered.

24 ANSWER: Admit.

## **BACKGROUND FACTS**

7. Syked Tuning is a small company engaged in the performance automotive market. Specifically, Syked Tuning provides “tuning” services, which include customizing parameters stored within a vehicle’s electronic control unit (or engine control unit) that affect various performance attributes of a vehicle. For example, a vehicle may be tuned or altered from the standard factory settings to provide better fuel economy, to produce more power, or to provide better handling and driving.

ANSWER: HPT lacks sufficient knowledge or information to admit or deny this allegation and demands strict proof thereof.

8. In addition to its tuning services, Syked Tuning develops and licenses a software product (the “Syked Software”) which enables Syked Tuning’s customers to personally perform custom tunes on the customer’s own vehicle. Syked Tuning is a recognized leader in the industry, specifically in the area of performance tuning of Dodge vehicles.

ANSWER: HPT lacks sufficient knowledge or information to admit or deny this allegation and demands strict proof thereof.

9. Syked Tuning has expended a great deal of time, effort, and resources developing the Syked Software. Syked Tuning protects its software through various legal mechanisms, such as by contract and trade secret.

ANSWER: HPT lacks sufficient knowledge or information to admit or deny this allegation and demands strict proof thereof.

10. Anyone who comes into possession of an authorized copy of the Syked Software must agree to be bound by an End User License Agreement (EULA) before the Syked Software can be used. The EULA is attached as Exhibit A.

ANSWER: HPT lacks sufficient knowledge or information to admit or deny this allegation and demands strict proof thereof.

1       11. The EULA includes various provisions protecting Syked Tuning's intellectual  
2 property, such as a provision barring the circumvention of technological measures that  
3 effectively control access to the Syked Software. Specifically, the Syked EULA contains the  
4 following provision:

5             Except as specifically permitted in this Agreement, you may not (i)  
6 copy the Software, (ii) modify the Software or separate out any of  
7 its components for use with other software (except to the extent  
8 contemplated in the enclosed user documentation) (iii) use the  
9 Software to provide time sharing, service bureau or similar  
10 services, or (iv) decompile, disassemble, or otherwise reverse  
11 engineer the Software.

12             See Exhibit A.

13       ANSWER: HPT lacks sufficient knowledge or information to admit or deny this  
14 allegation and demands strict proof thereof.

15       12. Accordingly, anyone who possesses an authorized instance of the Syked Software  
16 is barred from attempting to decompile, disassemble, or otherwise reverse engineer the Syked  
17 Software.

18       ANSWER: HPT lacks sufficient knowledge or information to admit or deny this  
19 allegation and demands strict proof thereof.

20       13. In addition, the licensed Syked Software includes technological measures that  
21 effectively control access to the Syked Software. Specifically, the Syked Software includes  
22 technological measures which require an authorized user to enter a code to validate that the user  
23 is authorized to use the Syked Software. The Syked Software communicates with the Syked  
24 Tuning server to authenticate the user against Syked Tuning's records. These measures  
25 effectively control the use of the Syked Software so that unauthorized users cannot make use of  
the software.

ANSWER: HPT lacks sufficient knowledge or information to admit or deny this  
allegation and demands strict proof thereof.

1       14. Upon information and belief, while this litigation has been pending, HP Tuners  
 2 has undertaken a campaign of misinformation and attacks directed at Sykes Tuning and Sykes-  
 3 Bonnett. HP Tuners is known to have approached numerous individuals in the tuning  
 4 community and offered them payment in exchange for testimony that can be used in this action.  
 5 In many cases, HP Tuners is believed to have engaged an individual named Tim Milliken as its  
 6 agent to pursue this illicit testimony.

7           ANSWER: Denied.

8       15. Mr. Milliken is a software developer well known in the tuning industry to have  
 9 exceptional software “hacking” skills. On information and belief, Milliken is also the founder  
 10 and proprietor of SC Research LLC, a South Carolina company engaged in reverse engineering  
 11 services, particularly for the automotive industry. Milliken is known to perform reverse-  
 12 engineering services for HP Tuners, including reverse engineering read/write protocols for  
 13 various ECM/TCM controllers, such as certain diesel controllers.

14           ANSWER: HPT lacks sufficient knowledge or information to admit or deny this  
 15 allegation and demands strict proof thereof.

16       16. HP Tuners had already involved Milliken in this lawsuit by at least as early as  
 17 January of 2018. On January 25, 2018 Milliken acted as an agent for HP Tuners by delivering a  
 18 settlement demand from HP Tuners to Sykes-Bonnett.

19           ANSWER: Denied.

20       17. In mid January 2018, Milliken embarked on a campaign of abuse and attacks  
 21 against Sykes-Bonnett and Syked Tuning. Prior to that time, Sykes-Bonnett and Milliken had a  
 22 cordial working relationship. The general nature of these attacks appeared to be retaliation for  
 23 the acts alleged by HP Tuners in this lawsuit. Indeed, Milliken posted a note to his Facebook  
 24 page which referred to extracting revenge against Syked Tuning. See Exhibit N.

1           ANSWER: HPT lacks sufficient knowledge or information to admit or deny this  
 2 allegation and demands strict proof thereof.

3           18. Milliken's actions escalated in late January of 2018, when Milliken began  
 4 publicly taunting Sykes-Bonnett and Syked Tuning with threats of "hacking" the Syked  
 5 Software.

6           ANSWER: HPT lacks sufficient knowledge or information to admit or deny this  
 7 allegation and demands strict proof thereof.

8           19. On or about January 30, 2018, Milliken posted on the Facebook account of SC  
 9 Research (Milliken's company) that he had been engaged by two "companies for C Sharp  
 10 protection analysis and source code recovery for comparison." See Exhibit B. Milliken further  
 11 threatened that "[a]nything that has not been asked to be private will be documented and released  
 12 to the public." This development concerned Sykes-Bonnett because the Syked Tuning Software  
 13 was developed in the C# programming language, and he believed that HP Tuners had engaged  
 14 Milliken to decompile the Syked Software for the purpose of comparing it to HP Tuners'  
 15 software. Milliken's pronouncement was a thinly veiled admission that he was hacking the  
 16 Syked Tuning Software for the purpose of comparing it to HP Tuners' software.

17           ANSWER: HPT lacks sufficient knowledge or information to admit or deny this  
 18 allegation and demands strict proof thereof.

19           20. On or about January 29, 2018, Milliken continued his taunts online by posting to  
 20 his Facebook page things like "The wana be hacker should have never f\*\*\*ked with the real  
 21 hacker. You've been put on notice and you know who you are. Enjoy." See Exhibit C. These  
 22 statements by Milliken heightened Sykes-Bonnett's concern and caused him to further believe  
 23 that Milliken was working with HP Tuners to hack the Syked Tuning Software, contrary to the  
 24 proscriptions against such in Syked Tuning's EULA.

1       ANSWER: HPT lacks sufficient knowledge or information to admit or deny this  
2 allegation and demands strict proof thereof.

3       21. Sykes-Bonnett confirmed his suspicion based on further comments made by  
4 Milliken on his Facebook page. For instance, Milliken made the following comment on his  
5 Facebook page:

6             “Error calling decryption routine  
7 Pedagogical C code”  
I wonder what this might do?

8       See Exhibit C at page 2.

9       ANSWER: HPT lacks sufficient knowledge or information to admit or deny this  
10 allegation and demands strict proof thereof.

11       22. Sykes-Bonnett recognized the lines of code quoted by Milliken in that post as  
12 coming directly from the Syked Tuning Software. Attached as Exhibit D are two screen captures  
13 (with non-salient portions obscured) which reveal that the lines of code quoted by Milliken came  
14 directly from the Syked Tuning Software. The only way that Milliken could have access to the  
15 lines of code recited above is by decompiling the Syked Software, again in violation of the  
16 provisions of the Syked EULA.

17       ANSWER: HPT lacks sufficient knowledge or information to admit or deny this  
18 allegation and demands strict proof thereof.

19       23. Over the ensuing few days, Milliken drastically escalated his attacks against  
20 Syked Tuning by publicly taunting Sykes-Bonnett and also sending text messages directly to  
21 Sykes-Bonnett with threats to hack the Syked Software and to release it to the public. This attack  
22 by Milliken had no purpose other than to incite Sykes-Bonnett by threatening to hack the Syked  
23 Tuning Software in exactly the same manner that HP Tuners alleges its own software was  
24 hacked. The similarity between Milliken’s actions against Syked Tuning and the acts originally  
25

1 complained of by HP Tuners solidified Sykes-Bonnett's belief that Milliken was acting at the  
 2 direction and control of HP Tuners in retaliation for the wrongs HP Tuners believes it endured.

3 ANSWER: HPT lacks sufficient knowledge or information to admit or deny this  
 4 allegation and demands strict proof thereof.

5 24. Given Milliken's close ties to HP Tuners, including Milliken's close personal ties  
 6 to HP Tuners' president Keith Prociuk, Sykes-Bonnett became gravely concerned that Milliken  
 7 would successfully gain access to the Syked Tuning server where Syked Tuning stored many  
 8 valuable data files and then share those files with HP Tuners. An example of such data files is  
 9 certain "templates" for 2018 Dodge vehicles which Syked Tuning was developing (the "Dodge  
 10 templates"). Again, Syked Tuning enjoys a substantial advantage over its competition with  
 11 regard to Dodge vehicles, and the Dodge templates are the digital embodiment of that advantage.

12 ANSWER: HPT denies that Milliken has "close ties" to HPT. Further responding,  
 13 HPT lacks sufficient knowledge or information to admit or deny the remaining allegations of this  
 14 paragraph and demands strict proof thereof.

15 25. Sykes-Bonnett feared that Milliken would gain access to the Syked Tuning server  
 16 and misappropriate those Dodge templates and provide them to HP Tuners since Milliken  
 17 appeared to be working for the benefit of HP Tuners. Accordingly, Sykes-Bonnett took the  
 18 Syked Tuning server offline temporarily to prevent such access. However, Syked Tuning's  
 19 customers require access to the Syked Tuning server so they can use the products which they  
 20 have purchased from Syked Tuning. For that reason, the Syked Tuning server could not be left  
 21 turned off. Thus, Sykes-Bonnett was forced to delete the Dodge templates from the Syked  
 22 Tuning server and then restart it so the customers could again use their authorized copies of the  
 23 Syked Software.

1       ANSWER: HPT denies that Milliken was “working for the benefit of HP Tuners.”  
 2 Further responding, HPT lacks sufficient knowledge or information to admit or deny the  
 3 remaining allegations of this paragraph and demands strict proof thereof.

4       26. When Syked Tuning restarted the server, Milliken immediately began publicly  
 5 taunting Sykes-Bonnett again. Milliken posted “Glad the server is back online, on to data  
 6 mining.” See Exhibit E. Then shortly thereafter, Milliken posted “Love having disk tools that  
 7 fully recover deleted files. Saved me lots of time.” See Exhibit F.

8       ANSWER: HPT lacks sufficient knowledge or information to admit or deny this  
 9 allegation and demands strict proof thereof.

10       27. Milliken surreptitiously gained access to the Syked Tuner server when it was  
 11 restarted, undeleted the Dodge templates that had been deleted from that server, improperly  
 12 retrieved a copy of those Dodge templates, and then provided those Dodge Templates to HP  
 13 Tuners at HP Tuners’ request.

14       ANSWER: HPT denies that Milliken “provided those Dodge Templates to HP Tuners  
 15 at HP Tuners’ request.” Further answering, HPT lacks sufficient knowledge or information to  
 16 admit or deny this allegation and demands strict proof thereof.

17       28. On or about January 30, 2018, Sykes-Bonnett confronted Milliken by text  
 18 message about whether he was in fact hacking the Syked Software. Sykes-Bonnett also directly  
 19 asked Milliken whether he was working on behalf of HP Tuners, Milliken was evasive and  
 20 tacitly admitted that he was by failing to deny it. Exhibit O.

21       ANSWER: HPT lacks sufficient knowledge or information to admit or deny this  
 22 allegation and demands strict proof thereof.

23       29. Syked Tuning was able to tune the first 2018 Dodge vehicle before any other  
 24 competitor in the tuning community. On March 6, Syked Tuning posted an announcement on  
 25 Facebook that Syked Tuning and A2Speed, a company with which Syked Tuning collaborates,

1 had successfully tuned a Dodge Demon. See Exhibit G. Again, on March 7, Syked Tuning and  
2 A2Speed posted that they had successfully tuned the first 2018 Dodge Demon to ever have  
3 received a custom tune. See Exhibit H.

4 ANSWER: HPT lacks sufficient knowledge or information to admit or deny this  
5 allegation and demands strict proof thereof.

6 30. Within two days, on March 9, HP Tuners posted its own announcement that it had  
7 also just released support for the Dodge family of vehicles. See Exhibit I. The again, on March  
8 12, HP Tuners announced that it was also releasing support for the Dodge Demon. See Exhibit J.

9 ANSWER: HPT answers that the communications speak for themselves and HPT  
10 denies any allegations inconsistent therewith.

11 31. Sykes-Bonnett became deeply concerned that indeed Milliken had provided  
12 Syked Tuning's Dodge templates to HP Tuners who then incorporated that information into HP  
13 Tuner's own software package. To address his suspicion, Sykes-Bonnet was able to examine  
14 certain screen output of the new HP Tuners software and confirmed that it appeared HP Tuners  
15 had indeed incorporated information from Syked Tuning's Dodge templates into HP Tuners'  
16 new software program. Sykes-Bonnett examined screen output from HP Tuner's newest software  
17 (attached as Exhibit K) which revealed that many parameters specific to the Syked Tuning  
18 Software had been incorporated into the HP Tuners software.

19 ANSWER: HPT denies that "many parameters specific to the Syked Tuning Software  
20 had been incorporated into the HP Tuners software" at any time. Further responding, HPT lacks  
21 sufficient knowledge or information to admit or deny the remaining allegations of this paragraph  
22 and demands strict proof thereof.

23 32. On or about January 30, 2018, Sykes-Bonnett reached out to Dan VanHorn  
24 regarding the possibility of Syked Tuning participating as a sponsor for an event known as the  
25 Modern Street Hemi Shootout, which is an automotive event focused on Dodge vehicles in

1 various performance challenges. Mr. VanHorn is a promoter for the event. VanHorn invited  
2 Syked Tuning to participate as an associate sponsor of the event.

3 ANSWER: HPT lacks sufficient knowledge or information to admit or deny this  
4 allegation and demands strict proof thereof.

5 33. On or about February 3, 2018, Syked Tuning paid the fee and became an associate  
6 sponsor of the Modern Street Hemi Shootout. This opportunity promised to bring substantial  
7 notoriety to Syked Tuning in the industry, especially given Syked Tuning's leadership position  
8 with Dodge vehicles.

9 ANSWER: HPT lacks sufficient knowledge or information to admit or deny this  
10 allegation and demands strict proof thereof.

11 34. On February 4, 2018, VanHorn publicly announced the sponsors for the Modern  
12 Street Hemi Shootout, including Syked Tuning as an associate sponsor. This information was  
13 widely disseminated in the automotive tuning and performance community.

14 ANSWER: HPT lacks sufficient knowledge or information to admit or deny this  
15 allegation and demands strict proof thereof.

16 35. Sometime between February 6 and 7, 2018, both Milliken and someone else  
17 representing himself to be a lawyer for HP Tuners began calling various other sponsors of the  
18 Modern Street Hemi Shootout. On information and belief, during those calls, Milliken and the  
19 person representing himself to be HP Tuner's lawyer levied threats and accusations against the  
20 other sponsors to the effect that they (the other sponsors) were in league with Syked Tuning and  
21 that they would all be dragged into the instant lawsuit unless they forced Syked Tuning to be  
22 eliminated from the sponsorship of the event. On information and belief, the person representing  
23 himself to be HP Tuner's lawyer was not Milliken, and the two individuals were never both on  
24 the same call.

ANSWER: HPT denies that anyone acting on its behalf “began calling various other sponsors of the Modern Street Hemi Shootout” at any time. Further responding, HPT lacks sufficient knowledge or information to admit or deny this allegation and demands strict proof thereof.

36. On February 8, 2018 at 6:36am, VanHorn terminated Syked Tuning's sponsorship and sent Sykes-Bonnett a message to that effect. See Exhibit L. VanHorn intimated that Syked Tuning's sponsorship was being revoked as a result of the campaign of threats being levied by Milliken and someone else on behalf of HP Tuners.

ANSWER: HPT denies that anyone was engaged in a “campaign of threats” on its behalf at any time. Further responding, HPT lacks sufficient knowledge or information to admit or deny this allegation and demands strict proof thereof.

37. On February 8, 2018 at 9:04am, Milliken sent to Sykes-Bonnett a text message taunting him about having his sponsorship revoked. See Exhibit M. Milliken sent the text message less than 2 ½ hours after Syked Tuning’s sponsorship was revoked.

ANSWER: HPT lacks sufficient knowledge or information to admit or deny this allegation and demands strict proof thereof.

38. On information and belief, Milliken was at all times acting as an agent for HP Tuners seeking to exact revenge for the acts complained of by HP Tuners and wrongfully attributed by them (HP Tuners and Milliken) to Syked Tuning.

**ANSWER:** Denied.

## **VIOLATIONS OF THE DMCA**

39. Syked Tuning realleges each and every allegation set forth in each and every foregoing paragraph, inclusive, and incorporates them by reference herein.

ANSWER: HPT repeats and restates its responses set forth in each and every foregoing paragraph, inclusive, and incorporates them by reference herein.

1       40.     HP Tuners' actions constitute direct circumvention of a technological measure  
2 that effectively controls access to a copyrighted work in violation of 17 U.S.C. § 1201(a)(1)(A).

3              ANSWER:     Denied.

4       41.     HP Tuners, through their engagement of and encouragement to Milliken's actions,  
5 are aiding and abetting or inducing violations of 17 U.S.C. § 1201(a)(1)(A).

6              ANSWER:     Denied.

7       42.     HP Tuners, by and through its agent Tim Milliken, circumvented Syked Tuning's  
8 technological measures to access the Syked Software in an unauthorized manner by bypassing  
9 the Syked Software usage restrictions.

10             ANSWER:     Denied.

11       43.     HP Tuners' acts constituting DMCA violations have been and continue to be  
12 performed without the permission, authorization or consent of Syked Tuning.

13             ANSWER:     Denied.

14       44.     HP Tuners has violated Section 1201 of the DMCA willfully and for private  
15 commercial gain.

16             ANSWER:     Denied.

17       45.     HP Tuners' conduct has caused damage to Syked Tuning and has unjustly  
18 enriched HP Tuners, in an amount to be proven at trial.

19             ANSWER:     Denied.

20       46.     As a result of HP Tuners' acts and conduct, Syked Tuning has sustained and will  
21 continue to sustain substantial, immediate, and irreparable injury, for which there is no adequate  
22 remedy at law. Syked Tuning is informed and believes, and on that basis avers, that unless  
23 enjoined and restrained by this Court, HP Tuners will continue to violate Section 1201 of the  
24 DMCA. Syked Tuning has no adequate remedy at law. Syked Tuning is entitled to injunctive  
25 relief to restrain and enjoin HP Tuners' continuing infringing conduct.

1 ANSWER: Denied.

2 **BREACH OF CONTRACT (EULA)**

3 47. Syked Tuning realleges each and every allegation set forth in each and every  
4 foregoing paragraph, inclusive, and incorporates them by reference herein.

5 ANSWER: HPT repeats and restates its responses set forth in each and every  
6 foregoing paragraph, inclusive, and incorporates them by reference herein.

7 48. The EULA provides that “Except as specifically permitted in this Agreement, you  
8 may not (i) copy the Software, (ii) modify the Software or separate out any of its components for  
9 use with other software (except to the extent contemplated in the enclosed user documentation)  
10 (iii) use the Software to provide time sharing, service bureau or similar services, or (iv)  
11 decompile, disassemble, or otherwise reverse engineer the Software.”

12 ANSWER: HPT answers that the EULA speaks for itself and HPT denies any  
13 allegations inconsistent therewith.

14 49. HP Tuners’ actions, as stated above, constitute breach of the EULA entered into  
15 or agreed to by HP Tuners acting in concert with Milliken, in violation of the laws of the State of  
16 Washington, by reason of which Syked Tuning has suffered and will continue to suffer, harm  
17 and irreparable injury.

18 ANSWER: Denied.

19 **TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS**

20 50. Syked Tuning realleges each and every allegation set forth in each and every  
21 foregoing paragraph, inclusive, and incorporates them by reference herein.

22 ANSWER: HPT repeats and restates its responses set forth in each and every  
23 foregoing paragraph, inclusive, and incorporates them by reference herein.

51. As recited herein, Syked Tuning had a valid and enforceable contractual relationship for a sponsorship with the promotor of the Modern Street Hemi Shootout at which Syked Tuning would have enjoyed immeasurable benefits.

**ANSWER:** Denied.

52. Syked Tuning is informed and believes, and on that basis avers, that HP Tuners and its agents were aware of that contractual relationship by virtue of the public dissemination of that information throughout the industry.

**ANSWER:** Denied.

53. By inducing the promotor of the Modern Street Hemi Shootout to breach its contracts with Syked, HP Tuners intentionally interfered with that contractual relationship.

**ANSWER:** Denied.

54. HP Tuners' actions were committed willfully and knowingly.

**ANSWER:** Denied.

55. As a result of HP Tuners' actions, Syked Tuning has suffered damage in an amount to be proven at trial, including but not limited to loss of goodwill, diversion of resources to attempt to prevent the development of hacks, and decreased revenue.

**ANSWER:** Denied.

56. HP Tuners' intentional interference with the contracts between Syked Tuning and VanHorn entitles Syked Tuning to compensatory damages, and other available relief.

**ANSWER:** Denied.

## **PRAYER FOR RELIEF**

WHEREFORE, HP Tuners LLC respectfully prays that this Court enter judgment in its favor on each and every claim and against Defendant/Counter-Plaintiff.

## **AFFIRMATIVE DEFENSES**

HPT incorporates by reference the foregoing paragraphs in their entirety. HPT hereby asserts the following affirmative defenses and reserves the right to assert, in the future, such additional defenses as may become available or apparent during discovery or through other pretrial proceedings. The assertion of any defense as an affirmative defense herein is not, and is not intended as, an admission that defendants have the burden of proof on any such defense or on any related element of Defendant/Counter-Plaintiff's claims.

## **FIRST AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred, in whole or in part, because they fail to state a claim upon which relief can be granted.

## **SECOND AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred, in whole or in part, by the doctrine of nominative fair use.

## **THIRD AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred, in whole or in part, by the doctrine of laches.

#### **FOURTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred, in whole or in part, by the doctrine of acquiescence.

#### **FIFTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred, in whole or in part, by the doctrine of unclean hands.

## **SIXTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred, in whole or in part, by the doctrine of estoppel.

## **SEVENTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred, in whole or in part, by the doctrine of waiver.

1                   **EIGHTH AFFIRMATIVE DEFENSE**

2       Plaintiff's claims are barred, in whole or in part, because the acts complained of by  
3 Plaintiff are acts of third parties and not of Defendants, for which Defendants are not  
4 responsible.

5                   **NINTH AFFIRMATIVE DEFENSE**

6       To the extent that Defendants may be found liable under any legal theory, any amounts  
7 Defendants may owe must be limited or reduced by contribution, setoff, indemnification,  
8 apportionment, or other relief.

9                   **TENTH AFFIRMATIVE DEFENSE**

10      Plaintiff's claims are barred, in whole or in part, because of its failure to mitigate  
11 damages.

12                   **ELEVENTH AFFIRMATIVE DEFENSE**

13      Plaintiff's claims are barred, in whole or in part, because it failed to join one or more  
14 indispensable parties to this action.

15      HPT asserts these affirmative defenses in order to preserve its right to assert them at trial,  
16 to give Defendant/Counter-Plaintiff notice of its intention to assert these defenses, and to avoid  
17 waiver of any defenses. HPT reserves its right to amend or supplement its affirmative defenses  
18 in the event additional information is obtained, through discovery or otherwise, that indicates the  
19 applicability of additional affirmative defenses.

20                   **DEMAND FOR JURY TRIAL**

21      Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, HPT demands a trial by  
22 jury of this action.

23                   **PRAYER FOR RELIEF**

24      WHEREFORE, Plaintiff/Counter-Defendant HP TUNERS, LLC respectfully requests the  
25 following relief:



1                   **CERTIFICATE OF SERVICE**

2                   I hereby certify that on May 29, 2018, I caused the foregoing to be electronically filed  
3 with the Clerk of the Court using the CM/ECF system which will send notification of such filing  
4 to all Counsel of Record.

5                   HEURLIN, POTTER, JAHN, LEATHAM,  
6                   HOLTMANN & STOKER, P.S.

7                   *s/ Stephen G. Leatham* \_\_\_\_\_

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